The Burden of Inheritance Tax

Joyce and Sybil Burden are unmarried sisters. They are aged 88 and 81 respectively, and for the past thirty years have lived in a house built on land inherited from their parents. If each leaves their share of the house and other property to the other by will, the house might have to be sold in order to pay the inheritance tax. This is charged at a rate of 40% under the Inheritance Tax Act 1984 (Inheritance Act 1984, ss. 3, 3A and 4), although it should be borne in mind that the actual likelihood of the house having to be sold has been doubted (See "Editor's Note" in [2006] 9 I.T.L.R 535, 537-538). The same level of tax would be payable if one sister transferred the house to the other inter vivos, and then died within seven years of doing so.

However, no inheritance tax would be payable if the sisters had been a married couple (Inheritance Act 1984, s. 18(1)), and perhaps even more significantly, this "marriage exception" was extended to same-sex couples entering a civil partnership when the latter became available in December 2005. Parties in other familial or interdependent relationships are not given any form of relief.

In Burden and Burden v. United Kingdom (App. No. 13378/05, [2007] 1 F.C.R. 69) (hereafter "Burden"), the sisters sought to challenge the relevant provisions before the European Court of Human Rights (hereafter "the Court"). By a bare majority, the Court held that there had been no discrimination under Article 14 of the European Convention on Human Rights (hereafter "the Convention"), in respect of the right to peaceful enjoyment of property (Article 1 of the First Protocol to the Convention).

This decision is as deferential as its result is tragic, a fact recognised by the dissenting judges. This note will argue that reform of the inheritance tax system should be undertaken to accommodate situations such as that faced by the Burdens. However, a significant redeeming feature of the case, namely its lack of effect on the concept of civil partnership, will become apparent in due course.

Although I intend to deal primarily with the family and property law aspects of this decision, it is worth pointing out that two of the UK's submissions led to pronouncements of more general importance for cases brought under the Convention. Firstly, the Government sought to argue that since no inheritance tax had yet accrued, the Burdens were only hypothetical victims. However, the Court held that it was "virtually certain" that one of them would be affected by inheritance tax in the near future, and that this was sufficient to render them "directly affected" by a violation, (paras. [27]-[29]) as required in cases such as Cornwell v. United Kingdom (App. No. 36578/97, ECHR 11 May 1999).

Secondly, the Court dismissed the UK's claim that the applicants should have sought a declaration of incompatibility under section 4 of the Human Rights Act 1998 before bringing the case to Strasbourg. It was emphasised that such a declaration is not binding on the parties to the case in which it is made and only confers on the minister concerned a power rather than a duty to amend the offending legislation. Therefore, section 4 does not necessarily provide an effective remedy (para. [39]). It is now clear that this element of the decision in Hobbs v. United Kingdom (App. No. 63684/00, ECHR 18 June 2002) is of general application.

Having unanimously declared the Burdens' application admissible, the Court went on to consider its substantive merits. The Court had no difficulty in deciding that Article 1 of Protocol 1 was engaged, since the case involved taxation on existing property (para. [53]). The applicability of Article 14, on the other hand, was much more problematic. The Government argued that the sisters had not entered a formal commitment, financial or otherwise, to each other. They described their relationship as an "accident of birth" and contrasted the situation with that of married couples and civil partners (para. [47]). The applicants countered this, somewhat convincingly in my view, by arguing that they had in fact taken on obligations towards each other, and that they were legally prevented from doing so formally. They argued that their decision to share their lives in this way was "just as much an expression of their respective self-determination and personal development" as a decision to become a spouse or a civil partner (para. [50]). The only difference, they claimed, was that they were not permitted to have a sexual relationship. As this is not a requirement in a civil partnership, it was argued this was irrelevant (ibid.).

Although these submissions of the parties were discussed, the majority neatly side-stepped this fundamental issue. They did not feel the need to decide whether the Burdens were in a situation factually analogous to a married couple or a civil partnership, since even if they were, the relevant inheritance tax provisions pursued a legitimate aim in a proportionate manner within the margin of appreciation, such that Article 14 was not contravened (para. [58]). The legitimate aim being pursued, as articulated by the Government and accepted by the Court, is the encouragement of stable homosexual and heterosexual relationships. Few would doubt that this aim is legitimate, and perhaps it is justifiable to grant tax advantages to the particular categories of stable family relationships where economic interdependence is likely. In contrast, the Burdens' relationship as sisters, while both stable and familial, could legitimately be given less favourable treatment due to their being in a category where the parties are more likely to be independent. As the Court was at pains to point out, tax systems inevitably depend on relatively broad categorisations that inevitably exclude some hard cases for reasons of administrative efficiency (para. [60]).

The Court also began with the premise that it is for the state to determine the categorisations to be used in the taxation system unless it is both "manifestly without reasonable foundation" and contrary to Article 14 (para. [54]). This test is also relatively sound, and understandable given the range of taxation systems to which the Convention will be applied.

What is far from clear, however, is why the extent of the differential treatment present in the Inheritance Act was considered by the majority to have such a reasonable foundation. This is especially true where the discrimination is based on a factor that the Burdens could never change, namely that they are within the prohibited degrees of relationship and thus could not enter a civil partnership (Civil Partnership Act 2004, Schedule 1). The latter point means that, as the majority accepted (para. [58]), the case can be distinguished from that of Shackell v. United Kingdom (Application. No. 45851/99, ECHR 27 April 2000), in which the Court reached a similar decision in relation to unmarried cohabitants outside the prohibited degrees. Unfortunately, the Court did not apply this distinction when it rendered its conclusion in Burden.

The 1984 Act adopts an all-or-nothing approach: those in a marriage or civil partnership are given an absolute exemption from inheritance tax, while everyone else is faced with a bill amounting to 40% of the inherited assets beyond a certain threshold, plus interest that starts accruing at the time of death. Significantly, this threshold has failed to keep pace with rising house prices (see section 98 of the Finance Act 2005 for the figures), and the tax operates regardless of the level of economic interdependence or familial relationship between the parties. It is therefore the application of the proportionality test and the margin of appreciation by the majority that is truly open to question. The Court appeared to almost automatically find that the UK had acted proportionately and within their (admittedly wide) margin of appreciation once a legitimate aim had been ascertained (paras. [60]-[61]); Judges Bonello and Garlicki jointly dissented on this basis.

The joint dissenters accepted a presumption in favour of the Government, i.e. that a particular taxation measure is justified and within the margin of appreciation. However, they were of the view that once the applicants had demonstrated a situation of "apparent hardship or injustice", as the majority accepted they had in this case, the onus shifted to the Government to justify the measure and the Court must provide a full explanation if it is successfully to invoke the margin of appreciation. Both the Government and the majority had failed to meet this requirement, according to Judges Bonello and Garlickli.

Judge Pavlovschi, meanwhile, gave a more emotive dissent, branding the decision of the majority "legal, but unfair". He echoed the view of the other dissenters that the majority had produced insufficient evidence that the UK's approach was within the margin of appreciation. He saw the case as involving not simply a piece of property, but the family home itself, thus giving rise to issues under Article 8 of the Convention. The learned judge refused to accept that there was a pressing social need to cause suffering in addition to that inherent in losing one's sister. While many may bemoan the sparseness of Judge Pavlovschi's legal reasoning on this point, few would question his intuition.

However, it is submitted that there are definite legal reasons why the result in this case is unjust, and that more discussion and analysis should have been undertaken before the margin of appreciation was invoked. With respect, the Court should have decided whether the Burdens were in a relationship functionally similar to marriage, discussed the margin of appreciation at greater length and taken account of the Government's failure to produce evidence of the costs of providing an exemption for people in their situation (para. [52]).

Overall, the decision of the majority betrays an irony in the jurisprudence of the Court. On the one hand, it has shown a reasonable level of willingness to recognise the diversity of modern family relationships, as illustrated by cases such as Goodwin v. United Kingdom (App. No. 28957/95, (2002) 35 E.H.R.R. 18). On the other, in Burden it largely refused to sympathise with the consequences of the relationship between two people in a more "traditional" and long-recognised category. It is likely that much turns on the presence or absence of a consensus between the Contracting Parties on the particular issue in question.

It is beyond the scope of this note to suggest a comprehensive overhaul of the inheritance tax system, or to question the tax itself as a political principle. It does seem reasonable to suggest that some relief provision should be made where two people within the prohibited degrees of relationship share a house. A

scheme addressed specifically to all cases of actual economic interdependence (i.e. prioritising function over form) may well produce fairer results. However, this is likely to be considered unworkable in a system so dependent on categorisation, and the extent of the problem may be limited given that couples outside the prohibited degrees at least have the option to register a marriage or a civil partnership, however counterintuitive it may seem in a platonic relationship.

That said, it does not necessarily follow that civil partnerships should be extended to those within the prohibited degrees. In fact, the Court's resistance of the temptation to declare that the Civil Partnership Act itself breached Article 14 by discriminating against those within the prohibited degrees is the silver lining of the decision in Burden. Any other conclusion reached by the Court may have fatally undermined the concept of a civil partnership in its infancy.

The introduction of a status legally (even if not nominally, socially or culturally) equivalent to marriage for same-sex couples is an aim as legitimate as that of promoting stable familial relationships more generally. The 2004 Act admirably avoids most suggestions of discrimination on the grounds of sexual orientation under Article 14. Unlike the effect of the inheritance tax provisions, it was a prime candidate for deference, and thankfully the Court did not interfere.

To their credit, the applicants conceded that the Court could not dictate to the Government how best to remedy any discrimination (para. [52]). However, their counsel did refer to the "wrecking amendment" introduced by Conservative peers while the Civil Partnership Bill was going through Parliament. The unsuccessful amendment would have permitted "couples" within the prohibited degrees to enter civil partnerships provided they were over 30 years of age and had cohabited for 12 years (Hansard H.L. Deb. vol. 422, cols. 1363-1389 (24 June 2004)).

It is unclear whether the applicants genuinely wanted or expected the 2004 Act to be applicable to situations such as their own. On the one hand, they emphasised that their circumstances were similar to those of many civil partners in terms of mutual love and commitment. On the other, they used the Conservative amendment merely to illustrate that a statutory scheme could be constructed to cover relationships such as their own (a fact recognised by the joint dissenters), without suggesting that the 2004 Act must be extended (para. [52]). Quite understandably, they simply sought a solution to their predicament, whatever form that may take.

However, these arguments concern a point of great importance. While it is true that a sexual relationship is not required under the Civil Partnership Act, the same is largely true for marriage. The absence of sex will only invalidate a marriage in very restricted circumstances that are unlikely to be present in modern times (Matrimonial Causes Act 1973, ss. 12-13), and nullity itself has become somewhat outmoded.

The decision of the Court in B and L v. United Kingdom (App. No. 36536/02, [2006] 1 F.L.R. 35), in which it held that a former father and daughter-in-law had the right to marry under the Convention, has re-ignited the debate on the appropriateness of the "prohibited degree" rules (see, e.g., J.M. Scherpe, "Should There be Degrees in Prohibited Degrees?" (2006) 62 C.L.J. 32). However, their retention in marriage for the time being means that different treatment of civil partners would suggest a divergence in the status of marriage and civil

partnership. This, in turn, would undermine the symbolic significance of the 2004 Act for many same-sex couples, thereby risking unjustifiable discrimination against them.

Given these objections, the extension of the 2004 Act to couples within the prohibited degrees would be a wholly disproportionate and simplistic response to what is essentially a problem of taxation. Moreover, such a move might understandably be seen as a concession to those opposed to the formalisation of same-sex relationships in the first place, rather than a bona fide attempt to address the dilemma illustrated in Burden.

The conclusion to be drawn is that, although no breach of the Convention occurred in the view of the Court, Burden should prompt reform. However, that reform should be limited to the tax system, and should leave the concept of civil partnership intact to serve its purpose. While it remains to be seen whether the Court will continue to adopt such a deferential approach in other areas of social policy, an appeal to the Grand Chamber in this case seems likely.

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